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FOR THE DISTRICT OF NEVADA

- ) IN EQUITY NO. C-125-RCJ
- ) SUBFILE NO. C-125-B
- ) 3:73-CV-00127-RCJ-WGC

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**I. Procedural Background.**

The Amended Counterclaims of the Walker River Paiute Tribe (“Tribe”) and of the United States were filed in this proceeding in 1997. Docs. 58 and 59. Both make claims to water based upon federal law. The United States also makes claims to water based upon state law. The Walker River Irrigation District’s Motion asks the Court to dismiss the state law claims and all claims related to the pumping of ground water outside the boundaries of federal reservations.

After briefing, the Court entered a Case Management Order (“CMO”) Doc. 108. The CMO bifurcates the claims made by the Tribe and the United States for the Walker River Indian Reservation from the claims made by the United States for the other federal interests. It refers to the claims made for the Walker River Indian Reservation as the “Tribal Claims” and all of the remaining claims made by the United States as the “Federal Claims.” Doc. 108 at 2; 4. It provides that the Tribal Claims will proceed first. It stays the Federal Claims. *Id.* at 4. All of these claims are described in greater detail below. *See*, pgs. 3-4, *infra*. The CMO provides that certain threshold issues are to be addressed upon completion of service. Doc. 108 at 9-11. The threshold issues are directed at the Tribal Claims, but the CMO recognizes that the resolution of some issues may also impact the Federal Claims. Doc. 108 at 2-3.

The Supplemental Case Management Order (Doc. 1865) requires that threshold issues be addressed in the context of a motion under Fed. R. Civ. P. 12(b). Doc. 1865 at para. 3. It also directs that such motions address both the Tribal Claims and the Federal Claims. Doc. 1865 at p. 3, Ins. 18-25. The Court has since directed that initially only Rule 12(b) motions related to jurisdiction be filed. *See*, July 25, 2013, Transcript of Proceedings at p. 40, ln. 6 - 41, ln. 4; Nov. 4, 2013 Transcript of Proceedings at p. 55, Ins. 2-5; p. 67, ln. 3 - 68, ln. 1.

1       The motions on jurisdiction are to include the issues identified in the CMO related to  
2 ground water. July 25, 2013, Transcript at p. 19, ln. 20 - 23, ln. 11. Those issues involve the  
3 relationship between rights to surface water and rights to ground water ( the “surface-ground  
4 water relationship issues”). Nevada law treats surface and ground water as separate resources.  
5 Doc. 30 at 7. Similarly, under California law, percolating water; i.e., water that does not form a  
6 part of the body or flow, surface or subterranean of any stream, is regarded as a separate water  
7 source. The owners of the land overlying a single body of percolating water have correlative  
8 rights to the common supply. *See, Los Osos Valley Assoc. v. City of San Luis Obispo*, 30 Cal.  
9 App. 4th 1670, 36 Cal. Rptr. 2d. 758, 762 (Cal. App. 1994).

11       There are several surface-ground water relationship issues. The first is whether the Court  
12 has jurisdiction to decide claims to ground water. Doc. 108 at para. 11(a). A second is whether  
13 federal law governs ground water on federal reservations. *Id.* at para. 11(b). A third is whether  
14 rights to water established under federal law are entitled to protection from interference caused  
15 by the pumping of ground water which is different than the protections provided by Nevada and  
16 California law and the scope of the Court’s jurisdiction to provide such protection. *Id.* at paras.  
17 11(c), (d), (e) and (g). The last is whether it is necessary for the Court to consider such  
18 interference issues at the same time as it considers claims for surface water under federal law.  
19 *Id.* at para 11(h).

21       The CMO does not require the joinder of all users or potential users of ground water in  
22 the Walker River Basin. It limits domestic users to those who might be affected by pumping of  
23 ground water on the Walker River Paiute Indian Reservation. Doc. 108 at p. 3, lns. 11-14. It  
24 does not include any domestic users in the Antelope Valley Hydrographic Basin. *Id.* Finally, it  
25 includes larger ground water users in Nevada and in California because of the claim that ground  
26 and surface waters constitutes a single source. *Id.*, at lns. 21-25.



1 **II. Statement of Facts.**

2 The Amended Counterclaims both recognize that a final judgment was entered in this  
3 matter in 1936. Doc. 58 at para. 1; Doc. 59 at para 1. Both state that they seek water rights in  
4 addition to those “awarded to the United States” by the final judgment entered in this case, the  
5 Walker River Decree. *Id.*

6  
7 The Amended Counterclaims include claims under federal law and state law. The Tribe’s  
8 Amended Counterclaim seeks additional rights to surface and underground water based upon  
9 federal law for the Walker River Indian Reservation. Doc. 58, at paras. 17-22. The United  
10 States’ Amended Counterclaim makes identical claims for that Reservation. Doc. 59 at paras.  
11 10-19. It also claims rights to surface and ground water under federal law for the Yerington  
12 Paiute Reservation, Bridgeport Indian Colony, the Garrison and Cluette Allotments, Individual  
13 Allotments, the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the United  
14 States Marine Mountain Warfare Training Center and the Bureau of Land Management. Doc. 59  
15 at paras. 20-68.  
16

17 The United States also seeks rights to surface and ground water based upon state law for  
18 the Yerington Paiute Reservation, the Bridgeport Indian Colony, the Garrison and Cluette  
19 Allotments, the Hawthorne Army Ammunition Plant, the Toiyabe National Forest, the Mountain  
20 Warfare Training Center and the Bureau of Land Management.<sup>1</sup> Doc. 59 at paras. 24; 28-29; 35;  
21 47; 62; 65; 72; 77. The California state law claims include claims for appropriative, riparian and  
22 prescriptive surface rights and overlying rights to ground water.. *See, e.g.*, Doc. 59 at paras. 29;  
23 35. The United States alleges that some of the rights it claims under state law have already been  
24  
25  
26

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27 <sup>1</sup> These claims under state law are discussed in greater detail at 13-15, *infra*. The claims are  
28 stated in very general terms.

1 permitted by or have applications pending before the Nevada State Engineer (“State Engineer”)  
2 or the California State Water Resources Control Board (“State Board”). *Id.* at paras. 62; 73.

3 To the extent that appropriations were made for these reservations based upon state law,  
4 the date each was established is important. *See*, pgs. 13-15, *infra*. The Yerington Reservation  
5 was established by land acquisitions beginning in 1917 and ending in 1979. Doc. 59 at para. 23.  
6 The Bridgeport Indian Colony was established in 1974. *Id.* at para. 28. The Garrison and  
7 Cluette Allotments were established in 1933. *Id.*, at para 34. The Hawthorne Army Ammunition  
8 Plant was established in 1926. *Id.*, at para 42. Portions of the Toiyabe National Forest were first  
9 reserved beginning in 1907. *Id.*, at para 54. The Mountain Warfare Training Center dates from  
10 1951. *Id.*, at para 64. The Public Water Reserves of the BLM date from 1915. *Id.*, at para 68.

12 There is no allegation in either Amended Counterclaim that ground water pumping  
13 outside the boundaries of the Walker River Indian Reservation is presently interfering with the  
14 right awarded to the United States under federal law for that reservation by the Walker River  
15 Decree or for any additional federal rights being sought. There is no allegation in the United  
16 States’ Amended Counterclaim that ground water pumping outside the boundaries of any of the  
17 federal reservations is presently interfering with any of the water rights the United States claims  
18 for those reservations based upon federal law.

20 Together, the Amended Counterclaims allege six bases for subject matter jurisdiction.  
21 Three of the jurisdictional bases afford grounds for jurisdiction over new actions. Those bases  
22 are 28 U.S.C. § 1331, arising under the Constitution, laws or treaties of the United States; 28  
23 U.S.C. § 1362, brought by an Indian tribe under the Constitution, laws or treaties of the United  
24 States; and 28 U.S.C. § 1345, proceedings brought by the United States. The remaining three  
25 subject matter jurisdiction allegations are the continuing jurisdiction of this Court as provided in  
26  
27

1 the Walker River Decree, 28 U.S.C. § 1367, supplemental jurisdiction and 28 U.S.C. § 1651, the  
2 All Writs Act. *See*, Doc. 58 at para. 4; Doc. 59 at para. 2.

3 **III. The District's Motion.**

4 Since 1936, this matter has involved post judgment administration of the surface water  
5 rights adjudicated by the final judgment entered on April 24, 1936, as amended April 24, 1940,  
6 to conform to the mandate of the Court of Appeals in *United States v. Walker River Irrigation*  
7 *District*, 104 F.2d 334 (9th Cir. 1939). The final judgment, the Walker River Decree, does not  
8 retain jurisdiction to adjudicate or determine claims for new water rights to the Walker River or  
9 its tributaries. The Walker River Decree “did not concern itself in any way with underground  
10 water rights” and this Court does not administer underground water rights. Doc. 30 at 3, lns. 9-  
11 11; *see also*, Doc. 81 at 3.

12  
13 The District's motion addresses the Court's subject matter jurisdiction over the Tribal and  
14 Federal claims from two perspectives. First, it considers the Court's jurisdiction based upon the  
15 reservation of jurisdiction provision in the Walker River Decree. Second, it considers the  
16 Court's subject matter jurisdiction based upon the other grounds for jurisdiction alleged in the  
17 Amended Counterclaims. It asks the Court to dismiss all claims, except those based upon federal  
18 law.

19  
20 The Court does not have subject matter jurisdiction to adjudicate claims for new water  
21 rights to the Walker River or its tributaries under the reservation of jurisdiction provision in the  
22 Walker River Decree. The provisions of 28 U.S.C. § 1367 and 28 U.S.C. § 1651 do not expand  
23 that reserved jurisdiction to allow the Court to decide claims for new water rights. However,  
24 when new rights to water from the Walker River or its tributaries are recognized by the  
25 appropriate authority, the Court does have the power and authority to require those water rights  
26  
27  
28

1 to be administered under and consistent with the Walker River Decree, if such administration is  
2 appropriate.

3       The Court's jurisdiction under the Walker River Decree with respect to ground water is  
4 very limited. In the absence of allegations that the pumping of ground water outside the  
5 boundaries of the Walker River Indian Reservation is presently and actually interfering with the  
6 1859 water right recognized in the Walker River Decree for that Reservation, the Court does not  
7 have subject matter jurisdiction with respect to state law claims for or regarding the pumping of  
8 ground water. It also does not have subject matter jurisdiction with respect to the surface-ground  
9 water relationship issues because they are not ripe for adjudication.  
10

11       There is subject matter jurisdiction to consider the claims to surface and ground water  
12 under the federal implied reservation of water doctrine based upon independent grounds alleged  
13 in the Amended Counterclaims. That jurisdiction exists as to the Tribe's Amended Counterclaim  
14 under 28 U.S.C. § 1362 and as to the United States' Amended Counterclaim under 28 U.S.C. §  
15 1331 and § 1345.  
16

17       There is no supplemental jurisdiction over the claims made by the United States under  
18 state law. Jurisdiction over those state law claims under 28 U.S.C. § 1345 should not be  
19 exercised because most, if not all, such claims are not ripe for determination. In the absence of  
20 allegations that the pumping of ground water outside the boundaries of the other federal  
21 reservations is presently and actually interfering with the exercise of recognized rights to water  
22 based upon federal law, there is no jurisdiction over that pumping under 28 U.S.C. § 1345.  
23

24       The United States has the burden to establish subject matter jurisdiction. *Kokkonen v.*  
25 *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). It has not done that with respect to its claims  
26 under state law. This litigation can and should be narrowed to a determination of the merits of  
27  
28

1 the claims to surface water and ground water for these reservations based upon the federal  
2 implied reservation of water doctrine.

3 **IV. The Provisions of the Walker River Decree Do Not Give the Court Subject Matter**  
4 **Jurisdiction to Adjudicate Claims for Additional Water Rights.**

5 **A. The Court Did Not Reserve Jurisdiction to Adjudicate Additional Claims.**

6 In relevant part, Paragraph XIV of the Walker River Decree provides:

7 The Court retains jurisdiction of this cause for the purpose of changing the duty of  
8 water or for correcting or modifying this decree; also for regulatory purposes,  
9 including a change of the place of use of any water....

10 Walker River Decree at Paragraph XIV. The Amended Counterclaims allege claims for  
11 additional water rights. *See*, Statement of Facts at 3, *supra*. They do not seek to change the duty  
12 of water or to correct or modify the Walker River Decree. The Amended Counterclaims do not  
13 relate to any changes to existing water rights, nor do they relate to regulation of existing water  
14 rights. They do not seek to enforce the Walker River Decree.

15 Relying on the Walker River Decree as a basis for subject matter jurisdiction over the  
16 Amended Counterclaims is analogous to those situations where a party has either brought a new  
17 action or filed a supplemental pleading in a concluded action alleging a claim allegedly related in  
18 some manner to the concluded first action. Unless the original court expressly retained  
19 jurisdiction to do what it was being asked to do, the subsequent proceeding must have an  
20 independent basis for federal subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins.*  
21 *Co.*, 511 U.S. 375, 379-381 (1994); *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008,  
22 1017 (9th Cir. 2007); *Ortolf v. Silver Bar Mines*, 111 F.3d 85, 86-87 (9th Cir. 1997); *Hagestad v.*  
23 *Tragesser*, 49 F.3d 1430, 1433 (9th Cir. 1995).

24  
25  
26 When it filed this action in 1924, the United States recognized that seeking additional  
27 water rights under federal law must be accomplished by filing a new action rather than through a  
28

1 complaint filed in a water adjudication which had gone to final judgment and was in its  
2 administration, rather than adjudicatory, phase. When this action was filed in 1924, there was  
3 already an existing final judgment in *Pacific Livestock Company, et al. v. T. B. Rickey, et al.*, in  
4 the United States District Court for the District of Nevada, In Equity No. 731, in which that court  
5 had issued a decree and was administering the Walker River water rights it had adjudicated in  
6 1919. Rather than filing a complaint within that case, as it has done here, the United States filed  
7 a new action which resulted in the entry of the Walker River Decree.

8  
9 Similarly, in 1973, the United States sought recognition of a water right under the federal  
10 implied reservation of water doctrine for Pyramid Lake on the Pyramid Lake Indian Reservation.  
11 Rather than filing a complaint within *United States v. Orr Water Ditch Co., et al.*, In Equity No.  
12 A-3 (D. Nev. 1944), where the court was administering water rights, including water rights for  
13 the Pyramid Lake Indian Reservation under a final decree entered in 1944, the United States filed  
14 a separate and new action in the United States District Court for the District of Nevada which  
15 ended with the decision of the United States Supreme Court in *Nevada v. United States*, 463 U.S.  
16 110, 113-118 (1983).

17  
18 The situation is no different with respect to additional water rights under state law, except  
19 that since 1905 in Nevada and 1914 in California, appropriative water rights may only be  
20 obtained under state law by an application for and a permit issued by the appropriate state  
21 agency. *See*, N.R.S. §§ 533.030(1); 533.325; Cal. Water Code §§ 1225 *et seq.* No court may  
22 grant an appropriative water right established in either state after those dates. The Walker River  
23 Decree recognizes those facts. *See, e.g.*, Walker River Decree at para IX. New state law water  
24 rights must be established in accordance with state law requirements.

25  
26 This Court recognized that very same thing in an order entered April 9, 1990. That Order  
27 provides that applications to appropriate unappropriated waters of the Walker River or its  
28

1 tributaries in the State of California are to be processed in accordance with the laws of the State  
2 of California. *See* April 9, 1990 Order at para. 3, p. 3, Exhibit A attached hereto.<sup>2</sup> It states that  
3 in the event an application is approved and following final judgment of the courts of the State of  
4 California, should judicial review of such approval be sought, such rights will be administered by  
5 the Court through the entry of a supplemental decree. *Id.*

6  
7 **B. Supplemental Jurisdiction Does Not Expand the Court's Reserved  
8 Jurisdiction.**

9 In an action in which it has original jurisdiction, 28 U.S.C. § 1367(a) permits a federal  
10 court to exercise jurisdiction to hear and determine a claim over which it would otherwise have  
11 no independent basis for subject matter jurisdiction. 13 Wright, Miller, Cooper, Freer, Federal  
12 Practice and Procedure, § 3567 at 314 (2008). The justification for such jurisdiction is efficient  
13 judicial administration and convenience and fairness to litigants. *United Mine Workers v. Gibbs*,  
14 383 U.S. 715, 726 (1966).

15 Because the Walker River Decree, under its reservation of jurisdiction provision, does not  
16 establish an independent basis of federal subject matter jurisdiction here, 28 U.S.C. § 1367(a)  
17 cannot provide a separate jurisdictional basis for the Amended Counterclaims to proceed.  
18 Without original jurisdiction, there is no basis for supplemental jurisdiction at all.

19  
20 In *Ortolf v. Silver Bar Mines, Inc.*, 111 F.3d 85 (9th Cir. 1997), settlement agreements  
21 had ended two diversity cases. The District Court had not retained jurisdiction to enforce the  
22 settlement agreements. Because there was no retained jurisdiction, the Ninth Circuit held that  
23 there was no supplemental jurisdiction to enforce them. *Ortolf*, 111 F.3d at 87. The same is true  
24 here as to all claims based upon state law. The claims for water under federal law asserted in the  
25 Amended Counterclaims are claims which can be, and properly are, brought in a new federal  
26

27 \_\_\_\_\_  
28 <sup>2</sup> This Order is filed in C-125 as Doc. 161, Exh. B.

1 court action on an independent basis of federal subject matter jurisdiction. Supplemental  
2 jurisdiction does not apply to them.

3 The efficient judicial administration, convenience and fairness to litigants with which 28  
4 U.S.C. § 1367 is concerned, relates to litigating sufficiently related claims at the same time, in  
5 the same action. That principle does not apply where the adjudicatory phase of the underlying  
6 action was ended by final judgment some 56 years before the present claims were even filed.  
7 *See, Federal Savings and Loan Insurance Corp. v. Ferrante*, 364 F.3d 1037, 1039 (9th Cir.  
8 2004) (questioning, but not deciding, whether supplemental jurisdiction can attach following  
9 final termination of the underlying action.).  
10

11 There is no reason for the Court to assume supplemental jurisdiction over these new  
12 claims for water rights under the Walker River Decree's reservation of jurisdiction provision  
13 because their validity and existence can be determined without in any way impairing its authority  
14 to administer the Walker River Decree. If it is determined that additional surface water rights  
15 under federal law do in fact exist, the Court has the authority under the All Writs Act to require  
16 any such water rights to be administered in accordance with and as part of the Walker River  
17 Decree. That is essentially what is provided in the April 9, 1990 Order, Exh. A hereto.  
18

19 **C. The All Writs Act Does Not Expand the Court's Reserved Jurisdiction.**

20 The All Writs Act, 28 U.S.C. § 1651, does not provide any independent basis for subject  
21 matter jurisdiction in its own right. *Syngenta Corp. Protection, Inc. v. Henson*, 537 U.S. 28, 31  
22 (2002); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Its purpose is to allow a federal  
23 court to issue orders as may be necessary or appropriate to effectuate and prevent the frustration  
24 of orders it has previously issued. *See, United States v. New York Telephone Co.*, 434 U.S. 159,  
25 172 (1977).  
26  
27  
28



1           The Amended Counterclaims do not allege that the mere determination of whether these  
 2 additional water rights do or do not exist will in any way frustrate the Walker River Decree. If a  
 3 decision is made that the additional rights do exist, and if administration under the Walker River  
 4 Decree is appropriate, the All Writs Act allows the Court to enter an order requiring that the  
 5 newly determined water rights be administered as part of and consistent with the Walker River  
 6 Decree. In that respect, there is nothing different about claims to rights based upon federal law,  
 7 which may be determined by a federal court, than for new appropriations granted under state law  
 8 by the State Engineer, or by the State Board. The adjudication and resulting grant or denial of a  
 9 new water right under federal or state law does not interfere with or frustrate the Walker River  
 10 Decree. The Court has ample authority to require any such new rights to be administered under  
 11 and consistent with the Walker River Decree once granted.  
 12

13           If subject matter jurisdiction exists, it must exist on grounds independent from the Walker  
 14 River Decree.  
 15

16 **V.     The Subject Matter Jurisdiction of the Court Should Be Limited to a Determination**  
 17 **of Claims for Water Based Upon Federal Law.**

18 **A.     Introduction.**

19           The Amended Counterclaims do allege grounds for subject matter jurisdiction  
 20 independent of the Walker River Decree. The Court has subject matter jurisdiction over the  
 21 claims asserted by the United States and the Tribe for water rights claimed under federal law  
 22 based upon 28 U.S.C. § 1331 and under of 28 U.S.C. § 1362. The exercise of such jurisdiction  
 23 should result in the treatment of the Amended Counterclaims as a new action. While this  
 24 treatment may appear to elevate form over substance, it does not. It places the claims in their  
 25 proper perspective for analysis under principles of *res judicata*, rather than the equivalent of  
 26  
 27  
 28

1 motions to modify a final judgment. It also avoids involvement of this Court in issues related to  
2 ground water.

3 The federal implied reservation of water doctrine is based upon decisions of the United  
4 States Supreme Court. *See, Winters v. United States*, 207 U.S. 564 (1908); *Arizona v.*  
5 *California*, 373 U.S. 546 (1963); *United States v. New Mexico*, 438 U.S. 696 (1978). Claims to  
6 rights to water based upon such decisions are based upon the “laws” of the United States. *See,*  
7 *e.g., National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 850  
8 (1985).  
9

10 In addition to asserting water rights based upon federal law, the United States also seeks  
11 recognition and confirmation of water rights alleged to be held under Nevada or California law  
12 for the Yerington Reservation, Bridgeport Indian Colony, Garrison and Cluette Allotments,  
13 Hawthorne Army Ammunition Plant, Toiyabe National Forest, Marine Mountain Warfare  
14 Training Center and the BLM. *See*, Statement of Facts at 3. The allegations include claims to  
15 both surface and ground water under state law. *See*, Doc. 59 at 14 lns. 28-15 ln. 3; at 15 lns. 17-  
16 19; at 16 lns. 13-14; at 20 ln. 23-23 ln. 3; at 25 lns. 15-19; at 26 lns. 5-8; at 27 lns. 16-18; at 29  
17 lns. 12-13; at 30 ln. 28-31 ln. 4. The Court does not have supplemental jurisdiction over the  
18 United States’ state law claims to water.  
19

20 In appropriate circumstances, the provisions of 28 U.S.C. § 1345 give the Court  
21 jurisdiction over those state law claims because the United States is plaintiff. However, that  
22 jurisdiction does not exist here because the United States’ Amended Counterclaim does not have  
23 allegations showing that those state law claims are ripe for determination.  
24

25 **B. There Is No Supplemental Jurisdiction Over the State Law Claims of the**  
26 **United States.**  
27  
28

1       There is no supplemental jurisdiction over the state law claims of the United States  
2 because they are not “so related to [the federal] claims in the action ... that they form part of the  
3 same case or controversy” as required by 28 U.S.C. § 1367. A state law claim is part of the same  
4 case or controversy when it shares a common nucleus of operative facts with the federal claims,  
5 and the state and federal claims would normally be tried together. *Bahrampour v. R. O.*  
6 *Lampert*, 356 F.3d 969, 978 (9th Cir. 2004). *See also, United Mine Workers of America v.*  
7 *Gibbs*, 383 U.S. 715, 725 (1966). Here, the federal and state claims do not arise out of a  
8 common nucleus of operative facts and they are not claims that would normally be tried together.  
9 They do not rely on identical, or even similar, facts for their resolution and thus do not form part  
10 of the same case or controversy under Article III for purposes of supplemental jurisdiction. *See,*  
11 *Sea Land Service Inc. v. Lozen International LLC*, 285 F.3d 808, 814 (9th Cir. 2002).

12  
13       The operative facts necessary to establish the existence of a right to water based upon  
14 federal law are that the land has been reserved by the United States, the date of reservation, a  
15 primary reservation purpose requiring water and an amount of water necessary to fulfill that  
16 primary purpose. *United States v. New Mexico*, 438 U.S. 696, 698-702 (1978). The right and  
17 quantity do not depend on actual use of the water. The priority date for the water right is the date  
18 of reservation. Thus, the key operative facts are the fact, date and purpose of reservation.

19  
20       The operative facts necessary to establish a water right based upon state law varies based  
21 upon the law of each state and upon when it is alleged the water right was established. The fact,  
22 date and purpose of reservation are not relevant to any claim based upon state law.

23  
24       The operative facts necessary to appropriate surface and ground water under Nevada law  
25 before 1905 and surface water under California law before 1914, are a showing that water was  
26 placed to beneficial use on or before those dates. *Walsh v. Wallace*, 26 Nev. 299, 321 (1902);  
27 *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 211, 110 P. 927 (1910). Beneficial  
28

1 use is the basis, limit and measure of the right. *See*, N.R.S. § 533.035; Cal. Water Code § 1240.  
2 None of the reservations were established before 1905 and only one was partially established  
3 before 1914. *See*, pg. 4, *supra*.

4       After 1905 in Nevada and after 1914 in California, an appropriative surface water right  
5 may only be established by an application to and permit from the State Engineer, or the State  
6 Board. *See*, N.R.S. §§ 533.030(1); 533.325; Cal. Water Code § 1225; *In Re Fillipini*, 66 Nev.  
7 17, 202 P.2d 535 (1949); *Crane v. Stevinson*, 5 Cal.2d 387, 54 P.2d 1100, 1105-1106 (1936).  
8 Given the dates the reservations in question were established, it would appear that any  
9 appropriative rights to surface water for the reservations would have required applications to and  
10 permits from the State Engineer or the State Board. The United States' Amended Counterclaim  
11 seems to expressly acknowledge the requirement to comply with those procedures. *See*, pg. 3,  
12 *supra*. As discussed below, depending on the status of such compliance, such claims may not be  
13 ripe for consideration. *See*, pgs. 16-19, *infra*.

14       Under California law, a prescriptive right to the use of water may be obtained by a  
15 showing that the use of water is actual, open and notorious, hostile and adverse to the original  
16 owner's title, continuous and uninterrupted for five years and under a claim of title. *Pleasant*  
17 *Valley Canal Co. v. Borror*, 61 Cal. App. 4th 742, 72 Cal. Rptr. 2d 1, 30 (5th Dist. 1998). The  
18 United States' Amended Counterclaim reveals nothing about the specifics of its claim for  
19 prescriptive rights in California. Doc. 59 at paras. 29; 35.

20       In order to establish a riparian right in California, the land must be: (1) contiguous to the  
21 stream; (2) the smallest tract of land held under one title in the chain of title leading to the  
22 present owner; and (3) within the watershed of the stream in question. *Pleasant Valley*, 72 Cal.  
23 Rptr. at 23. A riparian owner has a right to use an amount of water reasonably necessary for  
24 beneficial riparian purposes. *Id.* at 24. One cannot tell from the United States' Amended  
25

Counterclaim if the riparian rights it claims are dormant or are actually being exercised. Doc. 59, paras. 29; 35; 61; 62; 65; 66; 72; 73.

Nevada has required a permit from the State Engineer to appropriate ground water since 1905. California has different rules for different categories of ground water. Ground water which is not part of a surface stream or an underground stream is not regulated. This ground water is referred to as “percolating water” and an owner of land overlying such ground water has a right, analogous to a riparian owner on a surface stream, to reasonable use on his or her land within the basin. *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 5 P.3d 853, 863 (2000). Ground water which is underflow of a surface stream, or which itself is part of an underground stream, may be appropriated only in compliance with the California Water Code, by application to and approval by the State Board. *North Gualala Water Company v. State Water Resources Control Board*, 139 Cal. App. 4th 1577, 43 Cal. Rptr. 3d 821, 844 (1st Dist. 2006); *United States v. Fallbrook Public Utility Dist.*, 347 F.2d 48, 55-56 (9th Cir. 1965).

The California process for classifying ground water to determine if a State Board permit is required is technical and complicated. See, *North Gualala Water Company*, 43 Cal. Rptr. at 825-827; 833-843; State Board Order WRO 2003-0004, which may be found at [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/2003/wro2003-04](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2003/wro2003-04). One cannot tell from the Amended Counterclaim whether the ground water claimed has or has not been classified. Doc. 59 at paras. 29; 35; 66(a); 66(c). With the exception of wells in place for the Mountain Warfare Training Center, it appears that the United States’ claims to ground water in California are claims for dormant or unexercised rights. Compare Doc. 59 at paras. 29 and 35 with Doc. 59 at paras. 66(a) and 66(c).

The United States’ claims based upon federal law and its claims based upon state law do not arise from a common nucleus of operative facts. The operative facts for the claims to surface

1 water based upon federal law are the fact, date and purpose of reservation. The operative facts  
2 for the claims to surface water based upon state law of appropriation are beneficial use before  
3 1905 or 1914. Any state law appropriative right to surface water after those dates will require a  
4 showing of an application for permits to or the existence of permits in good standing from the  
5 State Engineer or the State Board. To the extent that such permits are required, they could not be  
6 tried with the claims based upon federal law. They must follow the state administrative  
7 processes. The same is true as to a ground water appropriation under Nevada law.  
8

9 Claims to riparian rights in California require information related to the location of the  
10 land in relationship to streams. Claims to surface water based upon California's law of  
11 prescription require a traditional showing of the elements of adverse possession. *See*, pg. 14,  
12 *supra*. Claims to ground water in California require a showing as to whether the water is  
13 percolating ground water, part of a surface stream or part of an underground stream. Depending  
14 on the nature of that evidence, an application for and permit from the State Board may be  
15 required.  
16

17 Moreover, rights established under federal law are not lost by non-use. Rights under state  
18 law may be lost by non-use. *See*, N.R.S. §§ 533.060; 534.090; Cal. Water Code § 1241. Thus,  
19 another operative fact related to the state law claims, but entirely irrelevant to the federal claims,  
20 will be the extent of non-use of any such rights.  
21

22 For all of these reasons, the United States' state law claims are not part of the same case  
23 or controversy as the federal claims and the Court does not have supplemental jurisdiction over  
24 them.

25 **C. The United States Has Not Met Its Burden to Show That Its State Law**  
26 **Claims to Water Are Ripe.**  
27  
28

1           The Court does have jurisdiction to consider the United States' state law claims under 28  
2 U.S.C. § 1345. *Cappaert v. United States*, 426 U.S. 128, 135 (1976). However, the court should  
3 not exercise that jurisdiction here because the United States has not met its burden to allege  
4 sufficient facts to demonstrate that its state law claims are justiciable, which includes  
5 demonstration of a ripe dispute. *Renne v. Geary*, 501 U.S. 312; 316; 320 (1991). If the  
6 allegations of the United States show anything on the ripeness of its state law claims, they show  
7 they are not ripe.  
8

9           If a claim is not ripe, federal courts lack subject matter jurisdiction, and the claim must be  
10 dismissed. *Southern Pacific Transp. Co. v. Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). The  
11 ripeness doctrine is drawn from Article III limitations on judicial power and prudential reasons  
12 for refusing to exercise jurisdiction. *Colwell v. Dept. of Health and Human Services*, 558 F.3d  
13 1112, 1123 (9th Cir. 2009). Article III ripeness requires a case which presents concrete, rather  
14 than abstract, legal issues. Prudential ripeness requires evaluation of the fitness of the issues for  
15 judicial decision and the hardship to the parties of withholding court consideration. *Id.* at 1124.  
16 The doctrine is intended to allow courts to avoid entanglement in abstract disagreements. *Lee v.*  
17 *Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997).  
18

19           The United States alleges that it is entitled to appropriative water rights "that either have  
20 been permitted and certificated pursuant to Nevada or California state law, or have applications  
21 pending for appropriation before the Nevada State Engineer and before the California Water  
22 Resources Control Board." Doc. 59 at para. 62; *see also* para 51; 73. If surface water is  
23 involved, based upon this Court's Order of April 9, 1990, when those administrative processes  
24 and any appeals therefrom are complete, the United States might bring those surface rights to this  
25 Court for administration under the Walker River Decree. There is nothing concrete for this  
26  
27  
28

1 Court to do until after final agency action, if then. *See, Tahoe Sierra Preservation Council v.*  
2 *Tahoe Regional Planning Agency*, 322 F.3d 1064, 1085-1086 (9th Cir. 2003).

3 Moreover, it is not clear which, if any, of these claimed state law surface rights are rights  
4 requiring administration under the Walker River Decree. For example, the surface streams  
5 associated with the Hawthorne Army Ammunition Plant flow into Walker Lake.

6  
7 The situation with respect to state law claims to ground water is similar. The CMO does  
8 not provide for, and the allegations in the Amended Counterclaims do not seek, a comprehensive  
9 adjudication of all rights to ground water in Nevada and California, or a comprehensive  
10 adjudication of surface and ground water as a single source of supply. Such a proceeding would  
11 require joinder of additional ground water users in Nevada and in California in order to bind all  
12 of them to the judgment. *See, City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d  
13 17, 25 (1949) (persons not joined not bound by judgment).

14  
15 Pursuant to his regulatory authority under N.R.S. § 534.110 within the Walker River  
16 Basin, the State Engineer has recognized the Antelope Valley (No. 106), Smith Valley Artesian  
17 (No. 107), Mason Valley (No. 108), East Walker Area (No. 109) and Walker Lake (No. 110)  
18 hydrographic basins. The California and Nevada portions of Antelope Valley likely form a  
19 single hydrographic basin. Bridgeport Valley in California is also a separate hydrographic basin.  
20 Even if there was going to be an adjudication of all ground water, there is no reason that there  
21 should be a simultaneous massive adjudication of all of the hydrographic basins. For example,  
22 claimants in the Mason Valley hydrographic basin need not be in an adjudication with ground  
23 water claimants in the California and Nevada portions of Antelope Valley, or for example, with  
24 California claimants in Bridgeport Valley.

25  
26 Based upon the dates of establishment of the reservations involved, the United States can  
27 have no rights to ground water under Nevada law unless it has permits from the State Engineer.



1 If it does and absent a comprehensive adjudication of ground water in the proper hydrographic  
2 basin, there is nothing to do in Nevada. There is certainly nothing for this Court to do in  
3 connection with its administration of surface water rights under the Walker River Decree.

4 The claims of the United States to ground water under California law are not ripe for  
5 judicial decision for two reasons. To have an overlying right, the United States must allege that  
6 the ground water is percolating ground water. If it is not, the United States rights to ground  
7 water will require a State Board permit. *See*, pgs. 14-15, *supra*. Second, except with respect to  
8 the Warfare Training Center, one cannot tell from the allegations if the claims to overlying  
9 ground water rights are being exercised. If they are not being exercised, they are not ripe for  
10 litigation absent a comprehensive adjudication of all ground water.

11  
12 Withholding court consideration of the California ground water claims does not pose a  
13 significant practical harm on the United States. These claims have been pending for nearly two  
14 decades, yet the United States has used water from the wells associated with the Warfare  
15 Training Center since 1986 and 1993, apparently without issues. Doc. 59 at paras. 66(a); 66(c).  
16 There is also no hardship as to any claimed rights which are not being exercised.

17  
18 The situation is similar with respect to the United States' riparian claims. There is no  
19 allegation that any such rights are being exercised and therefore no hardship to withholding  
20 consideration of them until they are exercised.

21  
22 **VI. The Court Does Not Have Jurisdiction Over Pumping of Ground Water**  
23 **Outside the Boundaries of the Federal Reservations, and the Surface-Ground Water**  
24 **Relationship Issues Are Not Ripe for Determination.**

25 The first issue concerning ground water, the Court's jurisdiction to decide such claims,  
26 has been addressed above. If the underlying claim is based on federal law, the Court has  
27 jurisdiction. *See* pgs. 11-12, *supra*. If it is based on state law, it does not. *See* pgs. 12-19, *supra*.  
28 The answer to the second issue, what law governs ground water on federal reservations, flows

1 directly from the law on which the right is based. If it is a right established under federal law,  
2 federal law applies. If it is established under state law, state law applies.

3       The allegations in the Amended Counterclaims are not sufficient to give the Court subject  
4 matter jurisdiction over or to decide the remaining surface-ground water relationship issues.  
5 Although both Amended Counterclaims ask the Court to recognize additional rights to surface  
6 and ground water under federal law, neither alleges that the pumping of ground water outside of  
7 any reservation is presently adversely affecting or interfering with the only presently recognized  
8 water right based upon federal law in the Walker River Decree, the 1859 right for the Walker  
9 River Indian Reservation. In addition, neither Amended Counterclaim alleges that pumping of  
10 ground water outside of any reservation will in fact interfere with any federal law water right  
11 which might be recognized in the future as a result of the claims being made by the United States  
12 and the Tribe. The Amended Counterclaims do not involve any appeal of a State Engineer or  
13 State Board decision allocating ground water.  
14  
15

16       Without those allegations, a federal court has no subject matter jurisdiction to consider  
17 pumping of ground water outside the boundaries of any reservation. In *United States v. Orr*  
18 *Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010), the Court considered the extent of a decree  
19 court's subject matter jurisdiction to review a State Engineer decision allocating ground water  
20 under state law in the face of an allegation that the State Engineer's ground water allocation  
21 would adversely affect the Pyramid Tribe's 1859 federal reserved right to surface water from the  
22 Truckee River as recognized in the Orr Ditch Decree. That Court found that the decree  
23 administration court would have jurisdiction when the ground water allocations are alleged to  
24 adversely affect the recognized federal right. 600 F.3d at 1154; 1159-1161.  
25

26       Moreover, by not alleging present interference of ground water pumping outside of a  
27 federal reservation with a recognized federal water right, the United States has not met its burden  
28

1 to show that the surface-ground water relationship issues are ripe for adjudication. *See* pgs. 16-  
2 19. Without those allegations, this Court has no jurisdiction to determine whether rights to water  
3 established under federal law are entitled to protection from interference by the pumping of  
4 ground water which is different than the protections provided by Nevada and California law and  
5 the scope of its jurisdiction to provide such protection. It is apparent that without those  
6 allegations, not only is it not necessary for the Court to consider such interference issues at the  
7 same time as it considers claims for surface water under federal law, the Court has no  
8 jurisdiction to do so.

10 If additional water rights under federal law are recognized as a result of this matter and an  
11 actual, rather than a hypothetical, situation arises where it is claimed that ground water pumping  
12 outside a reservation is interfering with a prior federal right, those issues will be ripe for  
13 determination and the court which determines those federal rights will have jurisdiction to  
14 entertain that claim at that time and to decide those issues. *See, Cappaert v. United States*, 476  
15 U.S. 128, 142-143 (1976). Until then, there is no reason for a court to entertain hypothetical  
16 issues of interference at the same time as it is adjudicating whether such additional federal rights  
17 in fact exist. To do so places holders of ground water rights outside the boundaries of any  
18 reservation in the impossible position of being required to show that their pumping of ground  
19 water does not interfere with water rights which may not exist, or if they do exist have not been  
20 quantified or given a priority date.

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

**VII. Conclusion.**

The Court should dismiss the United States' claims based upon state law, and all claims related to the pumping of ground water outside the boundaries of federal reservations.

Dated: February 9, 2015.

WOODBURN AND WEDGE

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of Woodburn and Wedge and that on the 9th day of February, 2015, I electronically served the foregoing *Walker River Irrigation District's Points and Authorities in Support of Motion to Dismiss Claims of United States Based Upon State Law Pursuant to Fed. R. Civ. P. 12(b)(1)* with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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